Supreme Court, U.S.
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No. 01-

IN THE
Supreme Court of the United States

BANK OF AMERICA, N.A.,

Petitioner,

v.

JULIO ABRAHAM, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Participants in an Employee Stock Ownership Plan ("ESOP"), a type of employee benefit plan regulated under ERISA, sued in federal court seeking to hold plan fiduciaries liable for alleged violations of ERISA. Simultaneously, these plan participants brought a state court action, asserting state-law breach of fiduciary duty, against the plan fiduciaries. The U.S. Court of Appeals for the Ninth Circuit held that plaintiffs' state-law claims are not preempted by ERISA and should not have been removed and tried in federal court. The questions presented are:

1. Whether federal law exclusively governs the duties of ESOP fiduciaries with respect to transactions that are exempt from ERISA's prohibited transaction provisions, but nevertheless regulated by ERISA (as the Third and Eighth Circuits have held), or whether ESOP fiduciaries are also subject to state-imposed duties with respect to such transactions?

2. Whether ERISA preempts state-law claims based on alternative theories of liability (as the Second Circuit has held), or whether such claims are not preempted so long as the plaintiffs do not sue in their capacity as plan participants (even though they did so in federal court)?

3. Whether ERISA's civil enforcement provision provides the exclusive remedies available to ERISA plan participants against ERISA fiduciaries for fiduciary breach (as the Sixth Circuit has held), or whether plan participants are free to pursue state-law remedies in addition to their remedies under ERISA?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

The Petitioner in this case is Bank of America, N.A., individually, and as successor to Security Pacific National Bank, also named as "The Bank of America" and "Bank of America NT & SA, as successor in interest by merger with Security Pacific National Bank, Indenture Trustee." Petitioner was a defendant in the district court and appellee/cross-appellant in the court of appeals.

Julio Abraham, Paul Agazzi; Giusppe Aiello; Bennie Anselmo, Sr.; Thomas Arens; Renato Avanzino; Lily Bacigalupi; Peter Bacigalupi, Jr.; David E. Ballestrazze; Mike Ballestrazze; William Bandettini; Mary Barieri; John Baroni; Pietro Battilana; Antoinette Bavoso; Michael J. Biagini; William Biondini, Sr.; Franklin Bishop; Herbie Boyd; Madeline Brandi; Paul Brunetta; Natalio Cadematori; Flavio Calcagno; Fernando Cambri; Rita Canevari; Thomas J. Canevari; Primo Capella; Costantino Caramatti; John Caruso; Amy M. Catelli; Getulio Catena; Frank Chappellone; Edward Chiappari; Attilio Chiesa; Estate of George Codino; Quanito Cuneo; Ugo Cuneo; Victor D'Agnolo; Ray Dal Pogetto; Casimiro Damele; Alfred De Martini; Eugene De Martini; Gino De Martini; Paul De Martini; Adolfo Del Carlo; Vince Delfino; Lawrence Della Cella; Mary Della Cella; Susan Della Cella; Anita Delucchi; Mario Delucchi; Normal Depaoli; Angelo L. Devincenzi; Gloria Devincenzi; James D. Devincenzi; Vicki Duhagon; Estate of J.B. Ellis; Alipio Fatica; Elmo Fatica; Giobatta Fazio; Leon Ferguson; Ana Ferrando; Luciano Ferrari; Charolette Fini; James Firpo; Sergio Folena; Alesio Foppiano; Fortunato Conti; Eva Franceschi; Pete Franceschi; Estate of Anna Marie Franco; Giacomo Franco; John P. Franco; John Frederick; Dorothea Garaventa; Edward Germano; Benedetto Ghigliazza; Bernardo Ghigliazza; Frederico Ghiglieri; Anna Ghirardozzi; Anna Ghirardozzi; Gloria Ghirardozzi; Lou Giannone; Carlo Ginocchio; Hugo Giovannini; Sisto Giuliacci; Ubaldo

Gobbo; Mario Grelli; Piero Grelli; Barbara Hamilton; Orel Jackson, Jr.; Pearlie B. Lee; Harold Lopez; Joseph Lucchetti; Luigi Sciamanna; Attilio Malatesta; Emil Mangini; Louis Matteucci; Roger Micheli; Luis Morales; Giacomo Moscone; John Moscone; Angelo Musante; Alvaro Nardi; Estate of Michele Nardi; Sandy Obertello; Tony Oneto; Ivan Oplanic; Vincenzo Pasquinelli; Antonio Passetti; Quinto Passetti; Alfredo Perli; Otto Perucci; Robert Pessagno; Virginia Pessagno; Rodovan Pesusic; Vonda Peverada; Hugo Pisani; Armando Pucci; Grace Puccinelli; Sergo Puccinelli; Flora Raggio; Inez Rajewski; Jack Rajewski; Louie J. Ratto; Paul Ratto; Peter Ratto; Angelo Ricchetti; Francesco Rissoto; William S. Roberts; Ernest Ronzani; Raniero Roselli; Mario Rossi; Albert Sciamanna; William Segarini; Ray Sharp, Sr.; Dante Steccone; Mario Steccone; Luis Stella; Estate of Billy Terry; Luis M. Torres; Tom Traverso; Linda Tregenza; Judy Vucci; Paul Worden; and Tony Zappettini were plaintiffs in the district court and appellants/cross-appellees in the court of appeals.

Norcal Waste Systems Inc., Norcal Waste Systems, Inc. Employee Stock Ownership Plan and Trust, Manuel C. Conte; Robert L. Anderson; Archie Humphrey; James Paye; Chase Manhattan Bank, N.A.; Security Pacific Bank; Bank of California; California Federal Bank; Michael T. Sangiacomo; Peter Gardella; John DeMartini; Fiore Garbarino; John B. Molinari; and Leroy Moretti were defendants in the district court and appellees in the court of appeals.

Petitioner Bank of America, N.A., is wholly-owned by Bank of America Corporation, a publicly traded corporation, in which no single shareholder owns more than 10% or more of its outstanding shares.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 265 F.3d 811. The opinion of the district court (App., *infra*, 21a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2001. A timely petition for rehearing was denied on November 14, 2001 (App., *infra*, 23a). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 409 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1109(a), provides in relevant part:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

2. Section 502(a) of ERISA, 29 U.S.C. § 1132(a), provides in relevant part:

> (a) Persons empowered to bring a civil action. A civil action may be brought – . . . (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title [*i.e.*, § 409 of ERISA].

3. Section 514(a) of ERISA, 29 U.S.C. § 1144(a), provides in relevant part:

> (a) Supersedure; effective date. [T]he provisions of this subchapter and subchapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under 1003(b) of this title.

STATEMENT OF THE CASE

1. *ERISA and ERISA Fiduciaries.* This Court has "observed repeatedly that ERISA is a comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system." *Great-West Life & Annuity Ins. Co. v. Knudson*, 122 S. Ct. 708, 712 (2002) (internal quotations and citations omitted). Congress enacted ERISA to "'assur[e] the equitable character of [employee benefit plans] and their financial soundness." ERISA § 2, 29 U.S.C. § 1001(a). In pursuit of these goals, Congress adopted a broad definition of a "fiduciary" with respect to an ERISA plan, ERISA § 3(21), 29 U.S.C. § 1002(21), and assigned to ERISA fiduciaries "a number of detailed duties and responsibilities, which include 'the proper management, administration, and investment of [plan] assets, . . . the disclosure of specified information, and the avoidance of conflicts of interest.'" *Mertens v. Hewitt Associates*, 508 U.S. 248, 251-52 (1993) (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142-43 (1985)); *see* ERISA § 404(a), 29 U.S.C. § 1104(a). Among their other duties,

ERISA fiduciaries are required to act "solely in the interest of the participants and beneficiaries" and with "care, skill, prudence and diligence . . . ." ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

Congress enacted a "'carefully integrated' civil enforcement scheme that 'is one of the essential tools for accomplishing the stated purposes of ERISA.'" *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52, 54 (1987)). Section 409(a) of ERISA provides that any person who "breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title" shall be personally liable for any losses resulting from the breach, to restore to the plan any profits of the fiduciary made through use of the plan's assets, and "shall be subject to such other equitable and remedial relief as the court may deem appropriate." 29 U.S.C. § 1109(a). Section 502(a)(2) of ERISA, in turn, authorizes any plan participant or beneficiary to bring a civil action "for appropriate relief under section 409." 29 U.S.C. § 1132(a)(2). *See Russell*, 473 U.S. at 142 n.9. In addition, § 502(a)(3) of ERISA authorizes any plan participant or beneficiary to bring an action seeking equitable relief for a fiduciary breach. 29 U.S.C. § 1132(a)(3); *see Varity Corp. v. Howe*, 516 U.S. 489, 511-12 (1996).

Congress expressly provided that ERISA "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." ERISA § 514(a), 29 U.S.C. § 1144(a). This unusually broad preemption provision, together with ERISA's "carefully integrated civil enforcement provisions," demonstrates that Congress intended § 502(a) to provide "the exclusive remedy for rights guaranteed under ERISA." *Ingersoll-Rand*, 498 U.S. at 144; *Russell*, 473 U.S. at 146. Indeed, "the pre-emptive effect of § 502(a) was so complete that an ERISA pre-emption defense provides a sufficient basis for removal of a cause of action to the federal forum notwithstanding the

traditional limitation imposed by the well-pleaded complaint rule." *Ingersoll-Rand*, 498 U.S. at 145; *accord Pilot Life*, 481 U.S. at 55; *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64-67 (1987).

2. *ESOPs*. An Employee Stock Ownership Plan, or "ESOP," is a type of ERISA plan that is "designed to invest primarily in qualifying employer securities." ERISA § 407(d)(6)(A), 29 U.S.C. § 1107(d)(6)(A). Congress authorized the creation of ESOPs to "solve the dual problems of securing capital funds for necessary capital growth and of bringing about stock ownership by all corporate employees." Pub. L. No. 94-455, § 803(h), 90 Stat. 1520 (1976).

"[T]he ESOP is designed to place employer stock in the hands of employees while providing the corporation with a ready source of investment capital." 1 Jeffrey D. Mamorsky, *Employee Benefits Law: ERISA and Beyond* § 2.04[1] (2001). In a typical ESOP, "[t]he employer establishes a qualified plan and trust. The trustee then applies to a lending institution for a loan. The trust applies the loan to purchase employer stock and pledges the stock as collateral for the loan. Each year thereafter, the employer makes a contribution to the trust in accordance with a formula agreed upon with the lending institution. The trustee then uses this contribution to make the required payment on the loan, and an amount of stock equal to each year's payment of principal is allocated to the accounts of all eligible employees." *Id.* There are some 11,500 ESOPs in the United States. In all, approximately $500 billion in stock, representing approximately 4% of the total value of U.S. corporate net worth, was held in ESOPs in 1999.[1]

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[1] *See* www.the-esop-emplowner.org/pubs/stats.html (visited on Feb. 8, 2002).

Because ESOPs are by definition designed to invest primarily in the employer's stock, Congress has excepted them from some of ERISA's requirements. ESOP fiduciaries are granted an exception to the general duty of fiduciaries under ERISA to "diversify the investments of the plan." ERISA § 404(a)(1)(C), (a)(2), 29 U.S.C. § 1104(a)(1)(C), (a)(2). In addition, ESOP fiduciaries may engage in certain transactions that would otherwise be prohibited by ERISA's prohibitions against engaging in transactions with a "party in interest" and self-dealing. ERISA § 406, § 1106. For example, Congress permitted an ESOP to borrow from the employer under certain conditions in order to buy the employer's stock. ERISA § 408(b)(3), 29 U.S.C. § 1108(b)(3).

Although "exempted" from certain provisions of ERISA in order to function as intended, ESOPs remain heavily regulated under ERISA. Both the Secretary of Labor and the Secretary of the Treasury have promulgated detailed regulations governing both ESOPs and "exempt" ESOP transactions. *See, e.g.*, 26 C.F.R. § 54.4975-7, -11 (2002); 29 C.F.R. § 2550.408b-3, 407d-6 (2002). For example, these regulations provide that, to protect the ESOP and its beneficiaries' retirement savings, an ESOP cannot engage in an exempt loan transaction unless the loan is without recourse against the ESOP and the collateral that a note holder holds is restricted to several narrow categories. *See, e.g.*, 26 C.F.R. § 54.4975-7(b)(5); 29 C.F.R. § 2550.408b-3(e).[2]

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[2] ERISA and its implementing regulations impose numerous other requirements on "exempt" loans: (1) the loan must be primarily for the benefit of plan participants and beneficiaries; (2) the interest rate on the loan must not be in excess of a reasonable interest rate; (3) the terms of the loan must be at least as favorable to the ESOP as the terms of a comparable loan resulting from arm's-length negotiations between independent parties; (4) loan proceeds must be used within a reasonable (...continued)

Although "the special statutory rules applicable to ESOPs inevitably affect the fiduciary's duties under § 1104," *Martin v. Feilen*, 965 F.2d 660, 665 (8th Cir. 1992), an ESOP fiduciary remains subject to fiduciary duties and obligations under ERISA. *See Moench v. Robertson,* 62 F.3d 553, 569 (3d Cir. 1995) ("ESOPs are covered by ERISA's stringent requirements, and except for a few select provisions . . . ESOP fiduciaries must act in accordance with the duties of loyalty and care."). As the Secretary of Labor has observed, ERISA's special provisions concerning ESOPs "do not relieve a fiduciary . . . from the general fiduciary responsibility provisions of [§ 1104] which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interests of plan participants and beneficiaries and in a prudent fashion . . . nor does it affect the requirement that a plan must be operated for the exclusive benefit of employees and their beneficiaries." 44 Fed. Reg., 50369 (Aug. 28, 1979). Even as to the specific exemptions for ESOPs, courts have held that an ESOP fiduciary may be held liable under ERISA where the investment in employer securities is an abuse of discretion. *Moench*, 62 F.3d at 571. For example, "'the prudent person standard requires that [a fiduciary] make a careful and impartial investigation of all investment decisions.'" *Id.* at 572 (quoting *Feilen*, 965 F.2d at 670).

3. *This Case*. Respondents are former employee-owners (or their heirs or assigns) of Norcal Solid Waste Systems, Inc. ("Norcal"), a company that provides garbage collection services in the City of San Francisco. In 1986, Norcal created an ESOP to purchase shares of its stock from

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time after receipt to acquire qualifying employer securities; and (5) collateral must be released in installments over the term of the loan. ERISA § 408(b)(3); 29 U.S.C. § 1108(b)(3); 26 C.F.R. § 54.4975-7(b); 29 C.F.R. § 2550.408b-3.

Respondents. A large group of Respondents – 44 out of a total of 147 – were participants in the Norcal ESOP. Respondents sold their Norcal stock to the ESOP in return for $65 million in cash and $36.5 million in long-term notes. The long-term notes bore substantial risk of non-payment, in that they were non-recourse against Norcal, not secured by Norcal's stock, and subordinated to the Norcal ESOP's senior indebtedness (including $65 million in bank loans used to make the cash payment to Respondents).

In 1987, Norcal merged with Envirocal, Inc. ("Envirocal"). As part of this transaction, the Envirocal ESOP was merged into the Norcal ESOP. Through April 1991, the Norcal ESOP paid each quarterly interest payment due on the long-term notes. In April 1991, however, the ESOP defaulted on its indebtedness to Respondents.

4. *Respondents' Dual Lawsuits.* The 44 Respondents who are participants in the Norcal ESOP filed an action in federal district court seeking relief under ERISA for alleged breach of duties by Norcal, the Norcal ESOP, the members of Norcal's board of directors, and the members of the Norcal ESOP's Administrative Committee. The complaint alleged that "[a]t all relevant times, Norcal, the Norcal Board and the individual defendants were fiduciaries with respect to the ESOP within the meaning of ERISA § 3(21), 29 U.S.C. § 1102(21), in that Norcal and the Norcal Board controlled the membership of the ESOP Committee under the terms of the Plan and these defendants exercised discretionary authority or control respecting the management or disposition of the assets of the Plan." ERISA Complaint ¶ 10. The plaintiffs further alleged that the defendants breached their fiduciary duty under ERISA to act as "a prudent person" and "solely in the interest of the Plan's participants and beneficiaries," by engaging in "speculative and leveraged acquisitions," including but not limited to the Envirocal transaction. *Id.* ¶¶ 16, 19.

Simultaneously with the filing of the ERISA action, the ESOP participants and the other Respondents filed this action in a California court asserting state-law claims against the same defendants, as well as the banks that lent money to Norcal and Petitioner's predecessor in interest, Security Pacific, which had served as the trustee under the trust indenture agreement that governed the long-term notes.[3] Respondents alleged "a series of breaches, misrepresentations, omissions, concealment, and conflicts of interest" in connection with the 1987 Envirocal transaction and subsequent ESOP activities, as in the federal ERISA case. For example, Respondents' state-law constructive fraud claim alleged a "breach of duty" involving a "relationship of trust and confidence" between Respondents and the "Company-sponsored ESOP and its [A]dministrative [C]ommittee members." Complaint ¶ 87. Respondents' state-law breach of fiduciary duty claimed that defendants "owed a fiduciary duty to [Respondents] as shareholders" that was breached when defendants "arranged for [Norcal] and the ESOP to enter into speculative mergers, consolidations and transfers . . . and to undertake massive new debts." Complaint ¶ 101.

Petitioner and its co-defendants removed the Respondents' state-court action to federal court on the basis of ERISA preemption. The district court denied Respondents' motion to remand the case to state court. *See* App., *infra*, 22a. It held that, at least with respect to the 44 Respondents who were ESOP participants and plaintiffs in the ERISA case in federal court, ERISA preempts the state

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[3] Petitioner Bank of America, N.A. is the successor by merger of Security Pacific National Bank, which served as the trustee under the trust indenture that governed the long-term notes. In addition, Bank of America was a senior lender (among several banks) and a financial advisor to Norcal. App., *infra*, 6a n.2.

law claims against the members of the ESOP Administrative Committee for breach of fiduciary duty, constructive fraud, and negligence. *See id.* at 21a-22a. The district court held that it had supplemental jurisdiction over the remaining claims and parties under 28 U.S.C. § 1367(a). *See* App., *infra*, 22a.

Respondents subsequently settled with Norcal and the Norcal ESOP. Respondents released all their claims against all parties, except for claims against the trustee under the trust indenture agreement for which the ESOP was not obligated to indemnify the indenture trustee. Following five years of litigation and a three-week jury trial, the jury returned a verdict for Petitioner on all remaining claims.

5. *The Appeal.* The Ninth Circuit held that none of Respondents' state law causes of action is preempted by ERISA or governed by ERISA's exclusive civil enforcement provision, and therefore the jury's verdict must be set aside and the case remanded to state court for lack of subject-matter jurisdiction.

As to ERISA's preemption clause, the Ninth Circuit conceded that "[t]he critical phrase 'relate to' has been the source of much confusion as well as multiple and slightly differing analyses by this court." App., *infra*, 10a. The Ninth Circuit recognized that a state law "relates to" an ERISA benefit plan "if there is a 'connection with' . . . such a plan," and that a state law claim is "connected with" a plan if the state law claim "bears on" an "ERISA-regulated relationship." App., *infra*, 10a (citing *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 324 (1997)). The court then considered three ERISA-regulated relationships – between the ESOP and plan fiduciaries, between the ESOP and "parties in interest," and between the ESOP and plan participants – but held that none of Respondents' state law claims bears on any of these relationships.

The Ninth Circuit acknowledged that "[c]ertainly that subset of Plaintiffs who were current Norcal employees would be 'parties in interest'" under ERISA. App., *infra*, 12a. It also recognized that ERISA generally forbids "any transaction constituting a 'lending of money or other extension of credit between the plan and a party in interest,'" and that the transactions at issue in this case were permissible under ERISA *only* because of ERISA's specific statutory exemptions applicable to ESOPs.

The court nevertheless rejected Petitioner's argument that ERISA – not state law – governs a sale of stock and extension of credit between a plan and the employee "parties in interest." The court reasoned that, because Respondents are asserting claims "arising from a transaction that was expressly exempted from the prohibited transaction provision," the plaintiffs' "status as 'parties in interest' is irrelevant." App., *infra*, 12a. Apparently failing to realize that "exempted transactions" *are* regulated by ERISA, the court held that because the transactions challenged by the Respondents fall within an exception to the prohibited transactions provision, Respondents' state-law claims "did not implicate the prohibited transaction provision" and "do not remotely concern the objectives of ERISA." *Id.* at 12a.

For similar reasons, the court of appeals concluded that the state law claims do not bear on the relationship between the ESOP and plan participants. Although 44 of the Respondents are plan participants, they are also creditors of the ESOP, and in the Ninth Circuit's view ERISA does not purport to regulate the relationship between a plan and its creditors even when they are plan participants. Accordingly, the court of appeals held, "any duties owed by the plan to the ESOP Participant [Respondents] are . . . parallel but independent to those owed to them as note holders." App., *infra*, 15a.

The court of appeals acknowledged Petitioner's argument that an ERISA fiduciary cannot act with undivided loyalty to the plan and its participants if the fiduciary is required, under the laws of different states, to advance other interests. App., *infra*, 15a. However, the court dismissed this argument as based on cases "decided prior to the recent trend narrowing the preemptive force of the 'relates to' standard." *Id.* at 16a. Moreover, it was "not immediately apparent" to the Ninth Circuit "how the alleged fraud, breach of [fiduciary] duty, and negligence of the Committee members on behalf of the ESOP here would directly conflict with their fiduciary duties under ERISA." *Id.* The Ninth Circuit held that there is no impact on the relationship between the ESOP and its fiduciaries because the fiduciaries are not being sued "in their capacity as plan fiduciaries." *Id.*

Finally, the court of appeals held that Respondents' claims are not governed by ERISA's exclusive civil enforcement provision. It acknowledged that, "[a]ssuredly, a subset of Plaintiffs are plan participants entitled to bring suit under the civil enforcement provision of ERISA," App., *infra*, 18a, as in fact 44 of them did by "filing a separate federal complaint contemporaneously with the state court action that was later removed," *id.* The court of appeals nevertheless held that even these 44 Respondents' claims fall outside ERISA's civil remedial provisions because they are "based upon rights that arise under state law in [Respondents'] capacity as former shareholders of Norcal," *id.*, and thus Respondents are not seeking relief as a plan participant or beneficiary to obtain any relief or enforce any provision of ERISA. *Id.* at 19a.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS HOLDING THAT THE DUTIES OF ERISA FIDUCIARIES, INCLUDING ESOP FIDUCIARIES, ARE GOVERNED EXCLUSIVELY BY ERISA.

The Ninth Circuit acknowledged that ERISA plan participants brought two separate actions against ERISA fiduciaries, one under ERISA's civil enforcement provisions and another under state law. The court of appeals nevertheless held that the plan participants' state-law claims were not preempted by ERISA, and their state-law action could not be removed to federal court, because the challenged transactions were exempt from ERISA's prohibited transaction provisions and the plaintiffs were not suing in state court "in their capacity" as plan participants.

The Ninth Circuit's decision conflicts with decisions of the Second, Third, Sixth, and Eighth Circuits. The decision in this case creates substantial uncertainty about the duties of ESOP fiduciaries, as well as other fiduciaries subject to ERISA. Under the Ninth Circuit's decision, ERISA fiduciaries are subject to both federal ERISA obligations and obligations imposed by state law whenever a transaction is "exempted" under ERISA or plan participants elect to sue in a capacity other than that of a plan participant. ESOPs established by companies that operate in more than one state are potentially subject to varying state laws throughout the Ninth Circuit, but subject only to ERISA in the rest of the United States.

In 1999 (the most recent year for which statistics are available), there were 11,500 ESOPs in the United States, holding approximately $500 billion in employer stock. Review is warranted to clarify the source of the duties imposed on ESOP fiduciaries, and the remedies available to plan participants and beneficiaries for breach of those duties.

A. The Ninth Circuit's Decision Conflicts With Decisions Of Other Courts of Appeals Holding That ERISA's Fiduciary Duties Apply To Transactions That Are Subject To An ERISA Exemption.

The Ninth Circuit's decision is grounded on the fact that the challenged transactions are exempt from certain restrictions that generally apply to ERISA plans and fiduciaries. For example, the Ninth Circuit noted that but for a statutory exemption from ERISA's "prohibited transaction" provisions, "any transaction constituting a 'lending of money or other extension of credit between the plan and a party in interest' would have been a prohibited transaction" under ERISA and therefore forbidden. App., *infra*, 12a (citing ERISA §§ 406(a)(1)(B), 408(b)(3) & (e), 29 U.S.C. §§ 1106(a)(1)(B), 1108(b)(3) & (e)). The Ninth Circuit concluded that, because the transactions at issue were "expressly exempted from the prohibited transaction provision," they were not regulated by ERISA and thus were subject to regulation under state law. App, *infra*, 12a. *See also id.* at 16a ("financial relationship arose from a transaction explicitly exempted from ERISA regulations"). On the basis of this reasoning, the Ninth Circuit held that Respondents' "status as 'parties in interest' is irrelevant," and that their claims "do not *remotely* concern the objectives of ERISA." *Id.* at 12a (emphasis added). The Ninth Circuit concluded that "[b]y carefully crafting exceptions to the transactions prohibited under ERISA and the conditions for those exceptions, Congress presumably understood the scope of the state law that would otherwise survive to govern such transactions in all aspects unrelated to the objectives and administration of ERISA." *Id.* at 13a.

The Ninth Circuit's ruling is incorrect, and conflicts with decisions of other courts of appeals holding that ERISA *does* govern transactions that fall within the exemptions to ERISA's prohibited transaction provisions for ESOPs. *See*

Moench, 62 F.3d at 571-72; *Feilen*, 965 F.2d at 665-66. The other courts have so held because a transaction that falls within an ERISA exemption remains subject to detailed regulation under federal law. *See, e.g.*, 26 C.F.R. § 54.4975-7, -11; 29 C.F.R. § 2550.408b-3, 407d-6. Moreover, ERISA fiduciaries remain subject to general duties to act solely in the interest of plan participants and beneficiaries, ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A), and to act as a prudent person, ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). Congress did not intend to permit states to add to or vary this uniform body of federal law governing the duties and responsibilities of ERISA fiduciaries. *See Pegram v. Herdrich*, 530 U.S. 211, 223-24 (2000); *see also* Robert N. Eccles, *Fiduciary Litigation Under ERISA*, *ERISA Fiduciary Law*, at 400 (1996) ("Because ERISA exclusively supplies the standard by which fiduciary conduct is measured, any claims alleging a breach of fiduciary duty based on state law will be preempted.").

In *Feilen*, 965 F.2d at 665, the Eighth Circuit, like the Ninth Circuit in this case, recognized that ERISA contains special exemptions applicable to ESOPs, including an exemption from "ERISA's strict prohibitions against dealing with a party in interest, and against self-dealing," ERISA §§ 406(b)(1) & 408(e)(3)(A), 29 U.S.C. §§ 1106(b)(1) & 1108(e)(3)(A); an exemption from the "duty to diversify the investments of the plan," ERISA § 404(a)(1)(C) & (2), 29 U.S.C. § 1104(a)(1)(C) & (2); and an exemption from the prohibition against borrowing from the employer to buy the employer's stock, ERISA § 408(b)(3), 29 U.S.C. § 1108(b)(3). The Eighth Circuit, however, unlike the Ninth Circuit, rejected the idea that transactions subject to ERISA's statutory exemptions are outside the scope of ERISA. To the contrary, the Eighth Circuit held that "ERISA's fiduciary duties under § 1104 [ERISA § 404] attach . . . to transactions that involve investing the ESOP's assets." Indeed, the Eighth Circuit specifically held that ERISA's fiduciary duties attach

to the ESOP's purchase of the employer's stock. *Feilen*, 965 F.2d at 666. In this case, in contrast, the Ninth Circuit determined that the ESOP's "acquisition of Norcal shares in exchange for restricted notes" falls within an ERISA exemption, and thus is "unrelated to any aspect of a relationship governed by" ERISA. App., *infra*, 16a.

The Ninth Circuit's decision also conflicts with the Third Circuit's decision in *Moench*, 62 F.3d at 553, which holds that ERISA's fiduciary duties apply to ESOP fiduciaries, including in particular an ESOP fiduciary's decision to invest in the employer's stock. Contrary to the Ninth Circuit, the Third Circuit expressly held that exempt transactions remain subject to regulation under ERISA and federal common law. *See id.* at 571-72 (looking to trust law to develop federal common law standards). As the Third Circuit recognized, it is difficult enough to delineate the responsibilities of ESOP fiduciaries under *federal* law, because they must satisfy the demands of competing congressional policies. *Id.* at 569. Subjecting ESOP fiduciaries to additional, and potentially conflicting, duties under *state* law (as the Ninth Circuit does) is plainly inconsistent with congressional intent.

B. The Ninth Circuit's Decision Conflicts With Decisions Of Other Courts Of Appeals Holding That ERISA Preempts Alternative State-Law Theories Of Liability For Conduct Governed By ERISA.

The Ninth Circuit's decision also rests on its conclusion that, although ERISA plan participants are suing ERISA plan fiduciaries in connection with an ERISA plan, they are not doing so "in their capacity" as plan participants. *See, e.g.*, App., *infra*, 16a (Respondents "claims were brought solely in their capacity as former shareholders and current creditors"); *id.* (defendants "are not being sued in

their capacity as plan fiduciaries"). To the Ninth Circuit, this is sufficient to avoid preemption, because "an otherwise preempted claim may survive to the extent it relies on a theory independent of the benefit plan." *Id.* at 18a.

This approach conflicts with decisions of the Second Circuit, which have held that an "alternative [state-law] theory of recovery for conduct actionable under ERISA" is preempted. *LoPresti v. Terwilliger*, 126 F.3d 34, 41 (2d Cir. 1997); *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 288 (2d Cir. 1992) (citations omitted). In *LoPresti*, the Second Circuit held that ERISA preempted a common law conversion claim to recover losses to an ERISA plan. The plaintiffs were allowed to proceed under state law only with respect to union dues that were not "plan assets," and therefore not subject to ERISA at all. *Id.* The Ninth Circuit, in contrast, did not dispute that the ESOP plan participants' state law claims involve plan assets and conduct that is "actionable under ERISA." Indeed, the Ninth Circuit acknowledged that the plan participants were pursuing a separate ERISA action. App., *infra*, 8a, 18a. Instead, the Ninth Circuit held that preemption was avoided because the plan participants were not suing in their capacity as plan participants, but were instead asserting an alternative theory of liability under state law. *Id.* at 16a. *See also Smith v. Dunham-Bush, Inc.*, 959 F.2d 6, 8 (2d Cir. 1992) (state-law claim preempted and subject to removal even though plan participant "sued [the defendant] only in its capacity as an employer, not as an administrator of the ERISA plan").

Under the Ninth Circuit's approach, plan participants and beneficiaries could readily avoid preemption by suing in any capacity other than that of an ERISA participant or beneficiary. This approach destroys ERISA's exclusive remedial scheme and its broad preemption provision.

C. The Ninth Circuit's Limited View of ERISA's Civil Enforcement Provisions Conflicts With Decisions of Other Courts of Appeals.

In *Pilot Life*, this Court explained that "[t]he deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive." 481 U.S. at 54. Indeed, "[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." *Id.*

There is no dispute that the Norcal ESOP participants and beneficiaries are entitled to sue under ERISA's civil enforcement provisions. The Ninth Circuit acknowledged that 44 plan participants did precisely that, bringing an action under ERISA against Norcal, its Board of Directors, the Norcal ESOP, and the ESOP's Administrative Committee (all of which were alleged to be ERISA fiduciaries) on the same day that they filed their state-law action. The Ninth Circuit nevertheless held that ERISA's civil enforcement provisions do not provide the plan participants' exclusive remedies. The Ninth Circuit reasoned, in circular fashion, that the plan participants' claims do not "fall within the scope of" ERISA's civil enforcement provisions, App., *infra*, 18a, because they had tailored their state-court action to assert rights "in their capacity as former shareholders of Norcal and current note holders," rather than as ERISA plan participants. App., *infra*, 16a.

The Ninth Circuit's decision conflicts with the Sixth Circuit's decision in *Smith v. Provident Bank*, 170 F.3d 609, 613 (6th Cir. 1999), which holds that "[c]ommon law breach

of fiduciary duty claims are clearly preempted by ERISA." As the Sixth Circuit explained, "[i]n enacting ERISA and broadly preempting state law, Congress intended to standardize the administration of employee benefit plans, including the duties and liabilities of fiduciaries." *Id.* In *Smith*, the Sixth Circuit relied on this Court's decision in *Taylor*, holding that state-law claims are deemed to be federal claims for purposes of the well-pleaded complaint rule, considered a claim to recover ERISA benefits under § 502(a)(1)(B). The Sixth Circuit explained that there is no basis for distinguishing between claims for benefits under § 502(a)(1)(B) and claims for breach of fiduciary duty under § 502(a)(2): "ERISA is at least as concerned with defining and standardizing the duties of a fiduciary as it is with providing for recovery of benefits." *Smith*, 170 F.3d at 613 (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251-53 (1993)). Accordingly, the Sixth Circuit held that "[a] claim for breach of fiduciary duty against the fiduciary of an ERISA plan *necessarily* presents a federal question." *Id.* at 614 (emphasis added) (citing *Kramer v. Smith Barney*, 80 F.3d 1080, 1083-84 (5th Cir. 1996)).

The Ninth Circuit's decision also conflicts with this Court's recognition that one of the primary objectives of ERISA is to create a uniform body of federal common law to govern the duties and obligations of ERISA fiduciaries. *Pilot Life*, 481 U.S. at 52, 56; *accord Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). The development of a uniform body of law was intended to "help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws." *Pilot Life*, 481 U.S. at 56 (quoting H.R. Rep. No. 533, 93d Cong., 2nd Sess. 12 (1973)). "The expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop, indeed, the entire comparison of ERISA's § 502(a) to § 301 of the LMRA, would make little sense if the remedies available to ERISA participants

and beneficiaries under § 502(a) could be supplemented or supplanted by varying state laws." *Pilot Life*, 481 U.S. at 56.

* * *

This Court's decision in *Rush Prudential HMO, Inc. v. Moran*, No. 00-1021 (argued Jan. 16, 2002), may present an additional reason to grant the petition. The petitioner in *Rush Prudential* argues that the state law at issue in that case is preempted because it "conflict[s] with Congress' overriding intent to create a uniform national system, governed by federal statutory and common law, for enforcing rights under ERISA plans." Pet. Br. 19. Petitioner further argues that "[t]he expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop . . . would make little sense if the remedies available to ERISA participants and beneficiaries under § 502(a) could be supplemented by varying state laws." *Id.* at 17 (internal quotation and citation omitted). *See also* Pet. Reply Br. 1 ("Congress intended ERISA's civil enforcement scheme to be exclusive and to preempt [alternative] state-law remedies" (internal quotations and citations omitted)).

Additionally, in *Rush Prudential* the Seventh Circuit held that the case was properly removed even though the claim was *not* preempted by ERISA. *See Moran v. Rush Prudential HMO, Inc.*, 230 F.3d 959, 966-67, 971-73 (7th Cir. 2000), *cert. granted*, 121 S. Ct. 2589 (2001). *See also Buce v. Allianz Life Ins. Co.*, 247 F.3d 1133, 1138 (11th Cir. 2001) (case removed under ERISA even though it involved solely applying state law to interpret insurance coverage that was provided as part of an ERISA benefits plan). By contrast, in this case the Ninth Circuit held that, to be removable, the state-law suit *must* be preempted under ERISA. *See* App., *infra*, 9a. Because this issue goes to the Court's Article III jurisdiction, the Court will necessarily pass upon it in order to reach the merits in *Rush Prudential*. *See, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93 (1998) (citing *Mt. Healthy City Bd. of Ed. v. Doyle*, 429

U.S. 274, 278-79 (1977); *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 2002

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 99-17132, 99-17040 and 99-17474

JULIO ABRAHAM, *et al.*,

Plaintiffs-Appellants,

v.

NORCAL WASTE SYSTEMS INC, *et al.*,

Defendants,

and

BANK OF AMERICA,
as successor to Security Pacific National Bank,
the Indenture Trustee,

Defendant-Appellee.

JULIO ABRAHAM, *et al.*,

Plaintiffs-Appellees,

v.

NORCAL WASTE SYSTEMS INC, *et al.*,

Defendants-Appellees,

THE BANK OF AMERICA,

Defendant-Appellant,

and

CHASE MANHATTAN BANK, N.A.,
BANK OF CALIFORNIA,
CALIFORNIA FEDERAL BANK,

Defendants.

BANK OF AMERICA NT & SA,
as successor in interest by merger with
Security Pacific National Bank, Indenture Trustee,

Plaintiff-Appellant,

v.

NORCAL SOLID WASTE SYSTEMS EMPLOYEE
STOCK OWNERSHIP PLAN AND TRUST,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California

D.C. Nos. CV 94-3076 CAL, 99-1175 CAL

(September 7, 2001)

Before THOMPSON, O'SCANNLAIN, and TASHIMA, Circuit Judges.

TASHIMA, Circuit Judge:

These consolidated appeals arise out of a complex background of financial transactions and litigation stemming from the leveraged buyout of company stock by an employee stock ownership plan. Plaintiffs in the earlier of the two actions (No. 99-17040 and No. 99-17474) ("Plaintiffs") originally brought suit in California state court, alleging only state law causes of action in their complaint. Defendants successfully removed the case to federal district court on the basis of complete preemption, pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.* The parties raise numerous issues on appeal from the ensuing litigation. Because we conclude that the

district court lacked original subject matter jurisdiction, necessary for removal pursuant to 28 U.S.C. § 1441, we must vacate the judgments below. We have jurisdiction to entertain this appeal from the district court's final judgment, 28 U.S.C. § 1291, and to decide the jurisdictional issue, *Toumajian v. Frailey*, 135 F.3d 648, 652-53 (9th Cir. 1998).

I. BACKGROUND

a. Facts

Norcal Solid Waste Systems, Inc. ("Norcal"), a California corporation, was an employee-owned garbage company. Plaintiffs are former employee-shareholders (or their heirs and assigns) of Norcal. Norcal created the Norcal Solid Waste Systems, Inc., Employee Stock Ownership Plan and Trust (the "Norcal ESOP" or "ESOP") to purchase shares from Plaintiffs in a leveraged buyout of company stock. There is no dispute that the ESOP is an employee benefit plan within the meaning of ERISA. In December 1986, Plaintiffs sold their stock to the ESOP as part of the leveraged buyout transaction for $65 million in cash and $36.5 million in long-term notes. Forty-four of the Plaintiffs also were Norcal employees and participants in the benefit plan ("ESOP participants").

The 1986 leveraged buyout was accomplished through a complex financing arrangement in which the ESOP's acquisition of Norcal's shares was financed by bank loans to Norcal, which in turn then lent those funds to the ESOP. Bank of America (the "Bank") served as a senior lender (among several banks) and a financial advisor to Norcal for the leveraged buyout. The long-term notes that were issued to the former shareholders pursuant to the buyout were governed by the terms of a trust indenture agreement (the "Indenture") between the Norcal ESOP, as obligor, and Security Pacific National Bank, as the trustee ("Security Pacific" or the "Trustee"). Security Pacific also acted as a lender to Norcal in the 1986 transaction.

The notes were non-recourse as against Norcal, were not secured by Norcal stock, were subordinated to the Norcal ESOP's senior indebtedness (*i.e.* the bank loans to Norcal that were subsequently lent to the ESOP), and were to be paid in accordance with ERISA regulations for exempt transactions. Among the other provisions of the Indenture relevant to the litigation were the following:

> Section 8.01(b): "In case an Event or Default has occurred and is continuing, the Trustee shall exercise such of the rights and powers vested in it by this Indenture, and use the same degree of care and skill in their exercise, as a prudent person would exercise or use under the circumstances in the conduct of his or her own affairs."
>
> Section 8.07(3): "[The Plan agrees] to indemnify the Trustee for, and to hold it harmless against, any loss, liability or expense incurred without negligence or bad faith on its part, arising out of or in connection with the acceptance or administration of this trust, including the costs and expenses of defending itself against any claim or liability in connection with the exercise or performance of any of its powers or duties hereunder."
>
> Section 10-2: "The Plan shall not consolidate with or merge into any entity or convey, lease or transfer its properties and assets substantially as an entirety to any Person unless the Plan shall first redeem the entire Outstanding principal of all of the Notes."

The Indenture also provided that "it shall be construed in accordance with and governed by the laws of the State of California."

In December 1987, Norcal consummated a transaction with Envirocal, Inc. ("Envirocal"), whereby the Norcal ESOP and the Envirocal ESOP (simultaneously with their respective sponsors) combined to form a single entity.[1] The former owners of Envirocal exchanged stock for a combination of cash and notes. Security Pacific also acted as a lender to Norcal in the 1987 Envirocal transaction. On May 15, 1988, in its capacity as the Trustee, Security Pacific sent an annual reporting letter to Plaintiff note holders stating, among other things, that "[n]o other action has been taken by the Trustee, in the performance of its duties under the Indenture, which, in its opinion, materially affect the Noteholders." Only in September 1988 did the ESOP advise its participants (44 of whom are among Plaintiff note holders) of the 1987 Envirocal transaction.

Between 1986 and April 1991, the Norcal ESOP paid each quarterly interest payment due on the notes, and the Trustee also transferred all of these payments to Plaintiff note holders, as required by the Indenture. In April of 1991, however, Norcal defaulted on its indebtedness to the bank lenders and to the Envirocal note holders, and the ESOP defaulted on its indebtedness to Plaintiff note holders. On March 7, 1991, Security Pacific sent letters to Norcal and the ESOP resigning as Trustee under the Indenture (as well as under the subsequent indenture formed for the Envirocal note holders, for which it also served as trustee), and on May 14, 1991 a successor trustee was formally substituted.

b. Proceedings

Plaintiffs commenced an action in California state court in 1994 against the Trustee, Norcal, the ESOP, Norcal's bank lenders, and several individual officers and directors of

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[1] The parties disagree on the structure of the transaction for purposes of Section 10-2 of the Indenture.

the defendant corporations (including some members of the ESOP Administrative Committee). The Bank was sued not only in its capacity as a lender in the 1986 leveraged buyout, but also as successor in interest to Security Pacific, which was both a lender and the Trustee.[2] Plaintiffs alleged state law causes of action including fraud, breach of contract, tortious interference with contract, negligence, breach of fiduciary duty, and unjust enrichment.

The alleged conduct underlying Plaintiffs' claims was a series of breaches, misrepresentations, omissions, concealment, and conflicts of interest by Defendants, as well as an alleged conspiracy among them, in conjunction with the initial leveraged buyout, the 1987 Envirocal transaction, and subsequent ESOP activities. These acts allegedly resulted in Plaintiffs' unwitting reliance in tendering their shares in Norcal for restricted notes, the failure to redeem or enforce redemption of those notes at the time of the Envirocal transaction, and the eventual default on those notes. Forty-four of the Plaintiffs, who were also ESOP participants, simultaneously initiated a separate action in federal district court against Norcal, the Norcal ESOP, and some individual defendants for the breach of their duties imposed by ERISA in conjunction with the 1987 Envirocal transaction and subsequent ESOP activities.

Defendants removed the action from state court to federal court on the basis of complete ERISA preemption. The district court denied Plaintiffs' motion to remand, concluding that, at least with respect to the subset of 44 Plaintiffs who were ESOP participants, the state law causes of action based on constructive fraud, fiduciary duty, and negligence were preempted by ERISA. The district court

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[2] The Bank succeeded to the interest of Security Pacific as the result of the merger of Security Pacific into the Bank.

then asserted supplemental jurisdiction over the remaining claims and parties. *See* 28 U.S.C. § 1367(a). On motion for partial summary judgment by Plaintiffs, the district court ruled on June 30, 1995, that the 1987 Envirocal transaction constituted a triggering event for purposes of redemption under Section 10-2 of the Indenture and that the ESOP had defaulted under the terms of that provision. In August 1995, Norcal and the ESOP completed a settlement with Plaintiffs for the principal due on the notes, but not the interest (the "Settlement"). Under the Settlement, Plaintiffs agreed to a broad release of all claims against all parties, excepting only their preservation of the claims against the Trustee falling outside the scope of the ESOP's contractual indemnity obligations to the Trustee pursuant to Section 8.07(3) of the Indenture. The district court subsequently entered orders determining the Settlement to be in good faith and dismissing the released claims and parties.

In February 1996, Plaintiffs filed a second amended complaint against the Bank of America alone. Prior to trial, Norcal and the ESOP intervened to obtain a declaration that they had no further indemnity obligations to the Bank under the Indenture after the Settlement. On December 17, 1996, the district court granted summary judgment in favor of Norcal and the ESOP on their complaint in intervention for declaratory relief. After trial on the remaining claims, judgment on the jury verdict was entered in favor of the Bank.[3] The district court denied Plaintiffs' motion for a new trial and entered final judgment on October 22, 1999. Plaintiffs timely appeal, and the Bank timely cross-appeals (No. 99-17040 and No. 99-17474).

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[3] The details of the verdict are immaterial to our analysis and disposition.

After the verdict, the Bank commenced a separate action in federal court against the ESOP seeking a declaration of its entitlement to indemnity under the Indenture for its post-Settlement defense costs in light of the specific findings of the special verdict. On cross-motions for summary judgment, the district court again ruled in favor of the ESOP on the indemnity issue. Final judgment in that action was entered on August 25, 1999. The Bank timely appeals (No. 99-17132).

II. JURISDICTION

Plaintiffs contend that the district court lacked subject matter jurisdiction at the time the case was removed and at the time of judgment; therefore, the denial of the motion to remand was error and the proceedings and judgment must be vacated.[4] The Bank, Norcal, and the ESOP contend that Plaintiffs' claims for constructive fraud, breach of fiduciary duty, and negligence in the state court complaint (at least with respect to the 44 Plaintiffs who are also ESOP participants) are subject to complete preemption under ERISA, providing the court with subject matter jurisdiction and a federal question to anchor removal of the entire action.[5]

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[4] None of the parties contends, nor is it the case, that any alleged jurisdictional defect on removal may have been corrected by the time of final judgment on the merits, either via diversity or otherwise. *Cf. Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699, 702-704, 92 S. Ct. 1344, 31 L.Ed.2d 612 (1972) (whether or not case is properly removed, if court proceeds to judgment on merits without objections, issue is whether district court would have had original jurisdiction if case had been filed in a federal court, measured at time of judgment). Thus the only relevant question is whether subject matter jurisdiction existed at the time of removal.

[5] For the purposes of this analysis, the original complaint is the operative pleading because that is the basis upon which removal was granted and Plaintiffs' motion to remand was denied. *See Toumajian*, 135 F.3d at 653 n. 2.

Questions of subject matter jurisdiction and removal are reviewed de novo. *Toumajian*, 135 F.3d at 652. The denial of a motion to remand a removed case by the district court is also reviewed de novo. *ARCO Envtl. Remediation, L.L.C. v. Dep't of Health and Envtl. Quality*, 213 F.3d 1108, 1111 (9th Cir. 2000).

Removal under 28 U.S.C. § 1441 requires that the complaint contain a claim within the original subject matter jurisdiction of the federal district court. *Toumajian*, 135 F.3d at 653. Thus, only if we can discern a federal question was removal proper.

Plaintiffs' complaint did not facially assert any federal claim; therefore, the original subject matter jurisdiction required to support removal exists only if ERISA completely preempted any of the state law claims. *See Rutledge v. Seyfarth, Shaw, Fairweather, & Geraldson*, 201 F.3d 1212, 1215 (9th Cir.), *amended by* 208 F.3d 1170 (9th Cir.), *cert. denied*, 531 U.S. 992, 121 S. Ct. 482, 148 L.Ed.2d 456 (2000). The doctrine of complete preemption has been described as "an independent corollary to the well-pleaded complaint rule". *Id.* (quoting *Harris v. Provident Life and Accident Ins. Co.*, 26 F.3d 930, 934 (9th Cir. 1994)). Complete preemption can be invoked only when two conditions are satisfied: (1) ERISA expressly preempts the state law cause of action under 29 U.S.C. § 1144(a) (*i.e.* "conflict preemption") and (2) that cause of action is encompassed by the scope of the civil enforcement provision of ERISA, 29 U.S.C. § 1132(a) (*i.e.* "displacement"). *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 60, 107 S. Ct. 1542, 95 L.Ed.2d 55 (1987); *Rutledge*, 201 F.3d at 1216. Neither of these conditions was satisfied in this case.

a. Conflict Preemption under 29 U.S.C. § 1144(a)

Section 1144(a) states, in relevant part, that "provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they

may now or hereafter relate to any employee benefit plan. . . ." The critical phrase "relate to" has been the source of much confusion as well as multiple and slightly differing analyses by this court. *See, e.g., Rutledge*, 201 F.3d at 1216-19 (surveying our approach to the "relates to" requirement but ultimately declining to develop a test "describing the outer bounds of ERISA [conflict] preemption"). We recognize that while this "relate to" language has been construed quite broadly in the past, the Supreme Court has narrowed the applicability of § 1144(a) in recent years ever since its decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S. Ct. 1671, 131 L.Ed.2d 695 (1995). *See also Toumajian*, 135 F.3d at 654 n.3 (acknowledging that "[r]ecently, the scope of this broad 'relate to' preemption was markedly narrowed" (quoting *Travelers*, 514 U.S. at 655, 115 S. Ct. 1671)).

State law "relates to" an ERISA benefit plan if there is a "connection with" or "reference to" such a plan. *Blue Cross v. Anesthesia Care Assocs. Med. Group, Inc.*, 187 F.3d 1045, 1052 (9th Cir. 1999) (quoting *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 324, 117 S. Ct. 832, 136 L.Ed.2d 791 (1997)). As we discussed in *Rutledge*, the "reference to" prong of the test is fairly precise and did not apply there – nor is it applicable here – because the state law in question did not act "immediately and exclusively" upon an ERISA plan nor is such a plan "essential" to the operation of the law. 201 F.3d at 1216 (quoting *Dillingham*, 519 U.S. at 325, 117 S. Ct. 832). Plaintiffs' allegedly preempted claims here were solely based on state law theories of constructive fraud, breach of fiduciary duty, and negligence, so the relevant state law certainly does not act immediately and exclusively on an ERISA plan, nor is such a plan essential to the operation of the law. In order "to determine whether a state law has the forbidden connection, we look both to the objectives of the ERISA statute as a guide to the scope of the state law that

Congress understood to survive, as well as to the nature and effect of the state law on ERISA plans." *Egelhoff v. Egelhoff*, 532 U.S. 141, 121 S. Ct. 1322, 1327, 149 L.Ed.2d 264 (2001) (internal quotation marks omitted). The only argument advanced for removal, and upon which the district court relied, is that the state law claims have the necessary "connection with" an ERISA plan because they encroach upon ERISA-regulated relationships.[6]

We have previously recognized that "a core factor leading to the conclusion that a state law claim is preempted is that the claim bears on an ERISA-regulated relationship." *Rutledge*, 201 F.3d at 1219. Under the rationale of a "relationship" test, "we look to whether the state law encroaches on relationships regulated by ERISA, such as between plan and plan member, plan and employer, and plan and trustee." *Blue Cross*, 187 F.3d at 1053. Those regulated relationships that are purported to be encroached upon in this case are between: (i) plan and "parties in interest," as

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[6] The parties do not suggest, and we do not believe there to be, any reason that the state law claims at issue here may fall within the three traditional areas of preemption identified in *Travelers* and incorporated into the analysis of this court in *Arizona State Carpenters Pension Trust Fund v. Citibank*, 125 F.3d 715, 723 (9th Cir. 1997), namely state laws that: (1) mandate employee benefit structures or their administration; (2) bind employers or plan administrators to particular choices or preclude uniform administrative practice; and (3) provide alternative enforcement mechanisms to obtain ERISA plan benefits. Nor do we find that jurisdiction could be supported by preemption under any of the myriad "different, though compatible, tests" formulated by this court in our elusive quest "to follow the Supreme Court in fulfilling the statutory mandate of broad preemption without intruding upon state laws beyond the intention of Congress and the objectives of ERISA." *Rutledge*, 201 F.3d at 1217. Even were we to "eschew[ ] such multi-factor tests in favor of a more holistic analysis guided by Congressional intent," our analysis would be no different. *Dishman v. UNUM Life Ins. Co. of Am.*, 250 F.3d 1272, 1278 n.15 (9th Cir. 2001). The only asserted basis for preemption here is an intrusion upon ERISA-regulated relationships.

defined in 29 U.S.C. § 1002(14); (ii) plan and participants; and (iii) plan and fiduciaries. We find none of these arguments persuasive.

With respect to the first relationship, the Bank, Norcal, and the ESOP each suggests that ERISA comprehensively governed the sale of stock and extension of credit between a plan and "parties in interest," such as the employees of the plan sponsor; and that absent the express statutory exemptions provided by ERISA, any transaction constituting a "lending of money or other extension of credit between the plan and a party in interest" would have been a prohibited transaction. *See* 29 U.S.C. § 1106(a)(1)(B); *see also id.* § 1108(b)(3) (exempting loan when "primarily for the benefit of participants and beneficiaries of the plan" and "at an interest rate which is not in excess of a reasonable rate") *and* § 1108(e) (exempting acquisition by a plan of qualifying employer securities if "for adequate consideration" and "no commission is charged"). Certainly that subset of Plaintiffs who were current Norcal employees would be "parties in interest" for the purposes of the prohibited transaction provision. *See id.* § 1002(14)(A). But the state law claims alleged in the initial complaint did not implicate the prohibited transaction provision, which "serves ERISA's purposes by protecting a plan's participants and beneficiaries from a depletion of plan assets through shady, inside deals." *Rutledge*, 201 F.3d at 1222. Indeed, the claims do not remotely concern the objectives of ERISA.

Like all Plaintiffs, the employees were suing as note holders for state law fraud, breach of fiduciary duty, and negligence arising from a transaction that was expressly exempted from the prohibited transaction provision; their status as "parties in interest" is irrelevant. Unlike in *Rutledge*, where the preempted claims were premised on a relationship between a plan and a legal service provider in the very respects governed by ERISA's regulation of prohibited transactions, the state law claims here do not bear

upon any ERISA-governed relationship between a plan and "parties in interest." *See id.* ("Because the allegation at issue in the state law claims . . . is precisely the sort of prohibited transaction governed by ERISA, we hold . . . that the claims are preempted.") By carefully crafting exceptions to the transactions prohibited under ERISA and the conditions for those exceptions, Congress presumably understood the scope of the state law that would otherwise survive to govern such transactions in all aspects unrelated to the objectives and administration of ERISA. In this way, the ESOP's relationship with Plaintiffs who were also Norcal employees was no different from its relationship with the rest of the Plaintiff note holders. *Cf. Arizona State Carpenters*, 125 F.3d at 724 ("As a service provider offering nonfiduciary custodial services, Citibank's relationship with the Trust Funds was no different from that between Citibank and any of its customers."). Accordingly, we conclude that "[i]n the circumstances of this case, the connection between the state common law principles and ERISA's regulation of employee benefit plans is simply too tenuous, remote or peripheral to trigger preemption." *Id.* (internal quotation marks and citation omitted).

Nor, under similar reasoning, is a relationship between plan and participant encroached upon here. Those Plaintiffs who were also ESOP participants have an independent creditor relationship with the ESOP as a corporate entity based upon their status as former shareholders and current note holders under the Indenture. *See Gen. Am. Life Ins. Co. v. Castonguay*, 984 F.2d 1518, 1521-22 (9th Cir. 1993) ("But ERISA doesn't purport to regulate those relationships where a plan operates like any other commercial entity – for instance, the relationship between the plan and its own employees, *or the plan and its insurers or creditors*, or the plan and the landlords from whom it leases its office space." (emphasis added)). The claims of fraud, breach of fiduciary duty, and negligence

arise from that status as note holders, and do not "touch on" the status of the ESOP as a benefit plan or of any of Plaintiffs as participants in that plan (or on any claim the participants may make against the plan in that capacity). *Cf. Blue Cross*, 187 F.3d at 1054 ("The . . . claims concern only promises that Blue Cross made as a health care plan to its participating physicians. They do not touch on Blue Cross' fiduciary status, or any claims that a beneficiary may make against Blue Cross in that capacity.").

In *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enter., Inc.*, 793 F.2d 1456 (5th Cir. 1986), an ERISA trust sought to invoke the state law of fiduciary duty as a stockholder by bringing a claim against a corporate director who was also a plan fiduciary. Finding no conflict preemption, the court stated:

> The director's duty arises from his status as director; the law imposes the duty upon him in that capacity only. Similarly, the shareholder's rights against the corporate director arise solely from his status as shareholder. That in such a case as ours the director happens also to be a plan fiduciary and the shareholder a benefit plan has nothing to do with the duty owed by the director to the shareholder. The state law and ERISA duties are parallel but independent: as director, the individual owes a duty, defined by state law, to the corporation's shareholders, including the plan; as fiduciary, the individual owes a duty, defined by ERISA, to the plan and its beneficiaries. Thus, the state law does not affect relations between the ERISA fiduciary and the plan or the plan beneficiaries as such; it affects them in their separate capacities as corporate director and shareholder.

Id. at 1468. Here, any duties owed by the plan to the ESOP participant Plaintiffs are also parallel but independent to those owed to them as note holders. The rights and duties under state law between the ESOP and the note holders, whether ESOP participants or not, are distinct from any ERISA-governed relationship between a plan and its participants. The state claims do not affect that regulated relationship.

The third relationship allegedly encroached upon is that between a plan and its fiduciaries, specifically those members of the ESOP Administrative Committee named in the complaint. It is suggested that, as ERISA fiduciaries, the members of the ESOP Administrative Committee were required by ERISA to act "solely in the interest of the [plan's] participants and beneficiaries" for the "exclusive purpose" of "providing benefits to participants and their beneficiaries," as well as "defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A). Assuming that the members of the Administrative Committee are fiduciaries within the meaning of 29 U.S.C. § 1002(21)(A), we do not believe that the ERISA-regulated relationship is implicated here. Relying on *Castonguay*, the ESOP contends that the Committee could not act with that undivided loyalty to the plan and its participants and beneficiaries required by ERISA if state law bound its members to account for the interests and obligations asserted by Plaintiffs. In *Castonguay*, an insurer brought state law fraud and negligent misrepresentation claims against an ERISA trustee based on allegedly false statements made while securing for the trust an insurance policy to pay for unmanageable plan payments to participants. 984 F.2d at 1520. Finding the state law claims to be preempted because they raised "precisely the sort of divided loyalty ERISA is meant to prevent," the court concluded: "We hold that, as a matter of federal law, ERISA plan trustees can't be held personally liable for the trust's contracts." *Id.* at 1523-24.

We first note that *Castonguay* was decided prior to the recent trend narrowing the preemptive force of the "relates to" standard under § 1144(a). Moreover, despite the broad language of undivided loyalties in *Castonguay*, it is not immediately apparent how the alleged fraud, breach of duty, and negligence of the Committee members on behalf of the ESOP here would directly conflict with their fiduciary duties under ERISA. Unlike that case, the state law claims here did not arise from transactions directly relating to plan benefits or administration. The conduct at issue concerned the acquisition of Norcal shares in exchange for restricted notes and a subsequent failure to redeem those notes. As such, the only impact that the state law duties might have had on the plan or its beneficiaries is an indirect economic burden, which we have held to be insufficient for conflict preemption. *See Blue Cross*, 187 F.3d at 1052 (holding "the economic effects that . . . claims might have on ERISA plans are not sufficient for preemption to occur"). Finally, as in *Sommers*, the members of the Committee are not being sued in their capacity as plan fiduciaries, but rather as the agents of the ESOP corporate entity that obtained Norcal shares from Plaintiff note holders. State law imposes duties upon them in that capacity only; it does not affect them in their capacity as ERISA plan fiduciaries and thus does not encroach upon any regulated relationship between the plan and its fiduciaries.

Plaintiffs brought suit in their capacity as note holders pursuant to the terms of the Indenture, which by its own terms is governed by California law. Although some Plaintiffs were also ESOP participants and Norcal employees, their claims were brought solely in their capacity as former shareholders and current creditors. Moreover, this financial relationship arose from a transaction explicitly exempted from ERISA regulations and the claims were unrelated to any aspect of a relationship governed by those regulations. The fraud, breach of fiduciary duty, and

negligence causes of action under state law have nothing to do with benefits, the administration of a benefit plan, or any duties imposed by ERISA. No ERISA-regulated relationship is encroached upon by the state law claims. Therefore, the state law claims do not "relate to" an ERISA benefit plan within the meaning of 29 U.S.C. § 1144(a). We conclude therefore that there was no basis to find conflict preemption under ERISA; thus, that the first condition for complete preemption was unsatisfied.

b. Displacement under 29 U.S.C. § 1132(a)

Section 1132(a) provides the exclusive claims that are available under ERISA, as well as by whom and against whom such claims may be brought. *See Toumajian*, 135 F.3d at 656. The Bank, Norcal, and the ESOP all contend that even though the state complaint did not state an ERISA cause of action on its face, the claims of the ESOP participant Plaintiffs should be displaced for purposes of complete preemption analysis because they are encompassed by ERISA's civil enforcement provision, specifically § 1132(a)(2)[7] and (a)(3).[8] We disagree.

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[7] Section 1132(a)(2) provides that a civil action may be brought "by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title." Section 1109 states in relevant part:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any such losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through the assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem

(continued...)

Pursuant to the terms of those subsections, "[p]articipants and beneficiaries, along with plan fiduciaries, depending on their respective roles, are authorized to bring actions for appropriate relief for breach of fiduciary duty or for injunctions or to obtain other appropriate equitable relief to redress an ERISA violation or to enforce the terms of the plan or the provisions of ERISA." *Toumajian*, 135 F.3d at 656; *see also* 29 U.S.C. § 1132(a)(2), (a)(3). Assuredly, a subset of Plaintiffs are plan participants entitled to bring suit under the civil enforcement provision of ERISA. In fact, the ESOP participant Plaintiffs here did precisely that by filing a separate federal complaint contemporaneously with the state court action that was later removed. The claims asserted by all Plaintiffs in the state court action, however, do not fall within the scope of § 1132(a) because those claims are based upon rights that arise under state law in their capacity as former shareholders of Norcal and current note holders under the Indenture, not upon any rights that are conferred, enforced, or governed by ERISA (nor upon a violation of the terms of a plan). As we have previously noted, "[A]n otherwise preempted claim may survive to the extent that it relies on a theory independent of the benefit plan." *Tingey v. Pixley-Richards West, Inc.*, 953 F.2d 1124, 1131 (9th Cir. 1992).

(footnote continued)

> appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

29 U.S.C. § 1109(a).

[8] Section 1132(a)(3) provides that a civil action may be brought:

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

As discussed at length earlier, the claims of fraud, breach of fiduciary duty, and negligence at issue seek relief for all Plaintiffs on the basis of their reliance in tendering their Norcal shares to the ESOP, the eventual default on their notes, and the failure to redeem or enforce redemption on their notes at the time of the Envirocal transaction. Also, for the purposes of those Plaintiffs who could be considered "parties in interest," the leveraged buyout is an exempted transaction. Plaintiffs are not seeking relief on behalf of an ERISA plan, as required under the express terms of 29 U.S.C. § 1109(a), which is incorporated into § 1132(a)(2), and our case law. *See Toumajian*, 135 F.3d at 656 (citing *Buster v. Greisen*, 104 F.3d 1186, 1189 (9th Cir. 1997)). Nor do Plaintiffs' claims derive from a breach of "any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter." § 1109(a). Therefore § 1132(a)(2) is inapplicable. Moreover, none of these Plaintiffs "seek[s] relief as a participant, beneficiary, or fiduciary to enjoin any act or obtain any other equitable relief to redress any violations or enforce any provisions of ERISA." *Toumajian*, 135 F.3d at 656. Therefore § 1132(a)(3) is not applicable either.

Norcal and the ESOP seek to distinguish *Toumajian* on the ground that the complaint at issue in that case asserted state law claims for professional malpractice against a non-fiduciary service provider, whereas in this case ERISA fiduciaries were named in the complaint. But irrespective of the status of any of Defendants as the fiduciaries of an ERISA plan, none of the state law claims can be characterized as fiduciary breach claims within the scope of ERISA's civil enforcement provision. Simply put, the claims do not concern any plan fiduciaries in their capacity as such. Nor do they otherwise fall within the scope of ERISA's civil enforcement provision, 29 U.S.C. § 1132(a). We conclude therefore that there was no basis for displacement under

ERISA; thus, the second condition for complete preemption was also unsatisfied.

III. CONCLUSION

In summary, we conclude that neither of the necessary conditions for complete preemption under ERISA was satisfied here. Plaintiffs brought suit based on state law theories of fraud, breach of fiduciary duty, and negligence that cannot be said to "relate to" an ERISA plan within the meaning of 29 U.S.C. § 1144(a); nor are the claims encompassed within the scope of ERISA's civil enforcement provision, 29 U.S.C. § 1132(a). It is of no consequence that some Plaintiffs were also employees of the plan sponsor and plan participants at the time of suit because the claims have nothing to do with their status as such. Like all Plaintiffs, the ESOP participants brought suit in state court solely in their capacity as former shareholders and current note holders pursuant to the terms of the Indenture. Thus, the state law claims have no bearing on any ERISA-governed relationship and are not displaced by ERISA's civil enforcement scheme. Because there is no basis for complete preemption under ERISA, there was no federal question subject matter jurisdiction to support removal. And without a federal question, there was no anchor for the assertion of supplemental jurisdiction.

Accordingly, the judgment in each case is vacated and these cases are remanded to the district court with directions that, in No. 99-17040 and No. 99-17474, the case be remanded to state court and, in No. 99-17132, the action be dismissed without prejudice. Plaintiffs-Appellants in No. 99-17040 shall recover their costs on appeal from Defendants-Appellees. The parties in No. 99-17132 shall bear their own costs on appeal.

VACATED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JULIO ABRAHAM, *et al.*,

Plaintiffs

v.

NORCAL WASTE SYSTEMS, INC., *et al.*,

Defendants.

C-94-3076 CAL

San Francisco, CA

November 18, 1994

Transcript of Proceedings

Before LEGGE, District Judge.

The Court: * * * The plaintiffs' motion to remand here is in 94-3076, and the assertion of jurisdiction by the defendants, which I think is correct, is that three of the state claims are preempted by ERISA: The constructive fraud claim, the fiduciary duty claim, and the negligence claim. And I don't think that this distinction among the parties, that is, that we have some note holders who are covered by – who are covered by ERISA, and we have some who are not, and that the suit is by people in their capacity as note holders, rather than their capacity as ERISA beneficiaries, really

answers the question, because I think the sweep of ERISA is a lot broader than that.

I think the sweep of ERISA, for all preemption and jurisdictional purposes, is whether common-law causes of action could or would, directly or indirectly, interfere with the relationships that are related by ERISA; in essence, by creating duties on the part of ESOP defendants that could be potentially inconsistent with the duties imposed by ERISA.

I think – with that preemption, I think the rest of the claims and the rest of the parties stay here under, whether you want to call it pendent jurisdiction, or a later test, supplemental jurisdiction. I think the jurisdiction is here.

* * *

(PROCEEDINGS ADJOURNED)

Certificate of Reporter

I, Raymond Linkerman, the undersigned official reporter of the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California, do hereby certify:

That the foregoing transcript, pages numbered 1 through 31 inclusive, constitute a true, full and correct transcript of my shorthand notes taken as such official reporter of the proceedings hereinbefore entitled, and reduced to typewriting to the best of my ability.

/s/ Raymond Linkerman
Raymond Linkerman

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 99-17132, 99-17040 and 99-17474

JULIO ABRAHAM, *et al.*,

Plaintiffs-Appellants,

v.

NORCAL WASTE SYSTEMS INC, *et al.*,

Defendants,

and

BANK OF AMERICA,
as successor to Security Pacific National Bank,
the Indenture Trustee,

Defendant-Appellee.

JULIO ABRAHAM, *et al.*,

Plaintiffs-Appellees,

v.

NORCAL WASTE SYSTEMS INC, *et al.*,

Defendants-Appellees,

THE BANK OF AMERICA,

Defendant-Appellant,

and

CHASE MANHATTAN BANK, N.A.,
BANK OF CALIFORNIA,
CALIFORNIA FEDERAL BANK,

Defendants.

BANK OF AMERICA NT & SA,
as successor in interest by merger with
Security Pacific National Bank, Indenture Trustee,

Plaintiff-Appellant,

v.

NORCAL SOLID WASTE SYSTEMS EMPLOYEE
STOCK OWNERSHIP PLAN AND TRUST,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California

D.C. Nos. CV 94-3076 CAL, 99-1175 CAL

(November 14, 2001)

Before THOMPSON, O'SCANNLAIN, and TASHIMA, Circuit Judges.

Bank of America's request for judicial notice is denied.

The panel has voted to deny the petitions for panel rehearing. Judges O'Scannlain and Tashima vote to deny the petitions for rehearing en banc and Judge Thompson so recommends. The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(b).

The petitions for panel rehearing and the petitions for rehearing en banc of Bank of America and Norcal Waste Systems, Inc. Employee Stock Ownership Plan and Trust are denied.